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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charge	)	CC Docket No. 95-72

Comments

The Ad Hoc Telecommunications Users Committee (Ad Hoc) hereby submits its comments on the Petition for Rulemaking filed on December 9, 1997 by the Consumer Federation of America, the International Communications Association and the National Retail Federation (hereinafter jointly referred to as "Petitioners"). Petitioners urge the Commission to initiate a rulemaking that would lead to prescription of cost-based interstate access charges. Ad Hoc supports Petitioners' request.

Petitioners demonstrate that the Commission's decision in the 1997 Access Reform Report and Order not to prescribe interstate access service rates based on Total Service Long Run Incremental Costs (TSLRIC) was predicated on the Commission's conviction that cost-based interstate access service rates quickly would emerge because of the imminent availability of Unbundled Network Elements (UNEs) at TSLRIC-based rates. Petitioners also are correct in pointing

out that the level of competition in the local exchange and access services market is minor at present and unlikely to increase much in the foreseeable future. Clearly, as Petitioners observe, recent decisions from the United States Court of Appeals for the Eighth Circuit will at least retard the development of competition in the local exchange and access service market.[1] As a consequence, Petitioners are entirely correct in urging the Commission to begin expeditiously a proceeding to set interstate access service rates based on TSLRIC measurements.

If access service pricing based on forward-looking incremental costs is appropriate for ILEC services facing competition, the Commission should also require such pricing for non-competitive services. As long as ILEC costs are common to competitive and non-competitive services, the Commission should set rates for the competitive and non-competitive services based on TSLRIC. The TSLRIC of providing access service should not be materially different, if at all different from the TELRIC of providing UNEs. Thus, while the Commission's jurisdiction to require TELRIC-based pricing of UNEs may be under a cloud, the Commission certainly has jurisdiction over the pricing of interstate access service. If the Commission believes that state public utility authorities should price UNEs based on TELRIC , it should accept responsibility to set interstate access service rates based on TSLRIC.

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[1] *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), *motion granted* (8th Cir., Oct. 14, 1997), *motion to enforce granted* (8th Cir., Jan. 22, 1998), *cert. granted, AT&T Corp. v. Iowa Utilities Board*, 1998 U. S. LEXIS (U.S., Jan. 26, 1998).

Ad Hoc, however, believes that there is an additional issue that the Commission must soberly consider. If it were to require the ILECs to set interstate access service rates at TSLRIC levels, some, or perhaps all, ILECs would contend that an agency order requiring such pricing would constitute government confiscation of the carriers' property. The Commission can count on the ILECs to vigorously contest such a decision.

The Commission, however, can avoid confiscation claims and can create an incentive for ILECs to reduce their interstate access service rates to TSLRIC levels. Ad Hoc previously has presented this approach to the Commission in an *ex parte* presentation in CC Docket Nos. 96-262, 94-1, 91-213 and 96-263, entitled, "The ILECs' Choice: Make Whole or Make Money." Ad Hoc explained that the ILECS are seeking a regulatory paradigm in which they would enjoy all of the protections traditionally provided to entities subject to strict rate of return regulation while also enjoying virtually unlimited pricing flexibility and absolutely unlimited earnings capability. In essence, the ILECs want to have it both ways. They want more favorable treatment than is afforded unregulated entities by the marketplace or has traditionally been extended to public utility-like entities by regulatory authorities. The Commission should not allow the ILECs to have it both ways.

The Commission should require ILECs to choose either a make whole approach or a make money approach. A make whole approach would allocate the risks and rewards of ILEC investments to ILEC ratepayers. Put differently, if the ILECS insist on guaranteed recovery of the difference between

their embedded accounting costs and lower TSLRIC (a make whole approach), they may so choose; but the implications of such a choice would be that the ILECs' return would be limited and they would not be given pricing flexibility. If, on the other hand, ILECs opt for the make money approach, they should be free to realize whatever earnings the market allows and would have very substantial pricing flexibility, but the price they must pay for the pricing flexibility and unlimited earnings potential would be to write-off the gap between their embedded accounting costs and relevant TSLRIC and reset their interstate access service rates at TSLRIC levels. The make whole/make money choice is entirely consistent with the legal principle that insofar as regulated companies are concerned, "reward follows risk and benefits follow burdens." See, *Democratic Central Committee of the District of Columbia v. Washington Metropolitan Transit Commission,* 485 F.2d 786 (D.C. Cir. 1973), cert. denied, 415 U.S. 935 (1974). The ILECs paradigm, however, is entirely inconsistent with the teaching of the *Democratic Central Committee* decision and is plainly unfair to consumers. Requiring the ILECs to choose make money or make whole would be reasoned decision-making; adopting the ILEC paradigm would be indefensible.

ILECs who choose the make money option, including the write off and rate adjustments, will not be able to assert persuasively that the Commission has confiscated their property. Their election of the make money option would be entirely voluntary. The Commission would not have required that they set their interstate access service rates at TSLRIC levels.

Ad Hoc looks forward to further discussing the make whole/make money proposal as part of a rulemaking that the Commission should initiate in response to the Petitioners' request.

In view of the foregoing, Ad Hoc urges the Commission to grant the subject Petition for Rulemaking.

Respectfully submitted,

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200.03/access reform/pldg comments on ica pet 4 rm

Certificate of Service

I, Jeffrey W. Jones, hereby certify that true and correct copies of the foregoing Comments on the Petition for Rulemaking filed by the Consumer Federation of America, International Communications Association, and National Retail Federation in CC Docket No. 96-262, CC Docket No. 94-1, CC Docket No. 91-213, and CC Docket No. 95-72 were served this 30th day of January, 1998 via first-class mail to the following persons:

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200.03/Access reform/CRT ICA pet.